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No. 146

In the Supreme Court of the United States

October Term, 1892

[redacted]

[redacted]

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 145

KALMAN GREENHILL AND FRANK PROCTOR, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ON MOTION TO VACATE AND REMAND

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Although petitioners were appellants in the court below and therefore responsible for presenting to that court the record on which they wished the cause to be judged, now, after the conviction has been affirmed and a petition for a writ of certiorari has been filed, they ask this Court to vacate the judgment and remand the cause to the district court for a new trial, or to the court of appeals for reconsideration, on the ground that the arguments of counsel were not recorded by the court reporter. This issue is raised for the first time on the present motion although the relevant facts were, of course, available at trial, dur-

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ing the pendency of the appeal and at the time of preparing the petition for certiorari. The motion comes too late to warrant consideration. See *Lawn* v. *United States*, 355 U.S. 339, fn. 16 at 362–363. Cf. *Giordenello* v. *United States*, 357 U.S. 480, 488; *Husty* v. *United States*, 282 U.S. 694, 701–702; *Duignan* v. *United States*, 274 U.S. 195, 200.

The trial commenced and was concluded in April 1960. Petitioners have annexed to their motion an affidavit by the court reporter to the effect that, in accordance with the then usual practice in the Northern District of Alabama, he did not record the arguments of counsel. However, as the appended affidavits of the reporter (Appendix A, *infra*) and of a deputy clerk (Appendix B, *infra*) show, the reporter was in the courtroom during the arguments for the purpose of noting objections by either side and any ruling which the court might render at such time. Neither side objected to this custom, nor was any objection made to any part of the arguments (R. 1886), despite the claim of trial counsel that he had been "disturbed" by the argument.

In their motions for new trial, filed on May 10, 1960, the petitioners did not complain of the practice of not recording the oral arguments, nor did they complain of any portion of the arguments to the jury made by the United States Attorney (R. 1939–1953, 1954–1968).

On April 18, 1961, the Court of Appeals for the Fifth Circuit decided *Stephens* v. *United States*, 289 F. 2d 308, holding it reversible error for the court

reporter to fail to record, *inter alia*, the arguments of counsel to the jury in a criminal case as required by the Court Reporter Act, 28 U.S.C. 753(b). On August 25, 1961, the petitioners filed their brief on appeal with the court of appeals. Neither then, nor on petition for rehearing, did they complain that in the trial court the arguments to the jury had not been recorded. Nor did they allege that the United States Attorney had made improper remarks in his argument to the jury.

In their petition for a writ of certiorari, filed in this Court on May 25, 1962, the petitioners did not challenge the failure to record the arguments of counsel. In very general fashion (Pet. 7), they merely complained that the United States Attorney had made efforts to portray petitioners as rich big-city operators from New York.

In the absence of timely objection in the trial court, alleged misconduct of government counsel would be ground for reversal only if so grossly prejudicial as to amount to plain error under Rule 52, F.R. Crim. P. Normally, a defendant cannot deliberately forego an opportunity to obtain relief from the trial court (*e.g.*, curtailment of any such improper conduct, instructions to the jury to disregard any improper argument, etc.), and save the point for appeal. See, *e.g.*, *Kreinbring* v. *United States*, 216 F. 2d 671, 673 (C.A. 8); *Knowles* v. *United States*, 224 F. 2d 168, 170 (C.A. 10); 84 A.L.R. 784, 795–796. Nor can he wait until the memory of witnesses is so faded that it is impossible accurately to reconstruct the record.

The best indication that petitioners have no serious complaint is that, not only was there no objection at trial, but appellate counsel did not consider the question worth arguing to the court of appeals, although their brief was filed after the *Stephens* decision on which they rely. In the light of these facts and the overwhelming evidence against petitioners summarized in the government's brief in opposition, the claim that counsel's argument amounted to plain error under Rule 52 is unconvincing. There is accordingly no reason to remand the cause.

For the reasons set forth, it is respectfully submitted that the motion to vacate and remand should be denied.

ARCHIBALD COX,
Solicitor General.

AUGUST 1962.

APPENDIX A

Affidavit of Arthur B. Hale, 9000 Fourth Avenue, South Birmingham, Alabama

STATE OF ALABAMA,
County of Jefferson:

Before me, the undersigned, a Notary Public in and for said County and State, personally appeared Arthur B. Hale, who is known to me and who, after being duly sworn, deposes and says as follows:

Affiant was an official court reporter for the United States District Court, Northern District of Alabama, when the case of the United States vs Kalman Greenhill and Frank Proctor, Case No. 14,592 Southern, was tried in the Southern Division of the Northern District of Alabama during the month of April 1960. Affiant was personally present during the trial of this case and personally transcribed the proceedings therein. Further, affiant was present during the entire oral arguments of counsel for both the United States and the defense for the purpose of noting objections by either party, and, or for any other purpose at the direction of the Court or counsel for either party.

During said oral arguments, no objections were made by counsel for either the United States or for the defense.

Done the 10th day of August, 1962.

ARTHUR B. HALE, *Affiant.*

Sworn to and subscribed before me at Birmingham, Alabama, this 10th day of August, 1962.

LESTER H. JONES,
Deputy Clerk, U.S. District Court.

APPENDIX B

Affidavit of Dan C. Strong

UNITED STATES OF AMERICA,
Northern District of Alabama:

Before me, the undersigned authority, appeared Dan C. Strong to me known who deposes and says:

I am a deputy clerk in the United States District Court for the Northern District of Alabama and was such on April 29, 1960. I was the courtroom deputy clerk during the trial of United States of America vs. Kalman Greenhill and Francis E. Procter, Jr. I have an independent recollection of court reporter A. B. Hale's being present during the argument of counsel. Upon reviewing notes that I made during the trial, I find that the arguments were made on April 29, 1960, from 2:02 p.m. to 5:14 p.m.

DAN C. STRONG, *Affiant.*

Sworn to and subscribed before me at Birmingham, Alabama, this the 2nd day of August, 1962.

WILLIAM E. DAVIS,
Clerk, United States District Court,
Northern District of Alabama.

U.S. GOVERNMENT PRINTING OFFICE: 1962